Office-Supreme Court, U.S.
FILED
OCT 16 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 596

HAROLD KONIGSBERG,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MICHAEL A. QUERQUES,
DANIEL E. ISLES,
Attorneys for Petitioner,
501 Central Avenue,
Orange, New Jersey.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8614-12

TABLE OF CONTENTS

	PAGE
Petition for Writ of Certiorari	1
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	7
Conclusion	32
Appendix:	
A—Statutory Provisions Cited and Quoted (18 U. S. C. Section 659—Interstate or Foreign Baggage, Express or Freight; State Prosecutions)	1a
B—Opinion and Order of the United States District Court for the District of New Jersey Denying Petitioner's Motion for Suppression of Evidence	3a
C—Opinion of the United States Court of Appeals for the Third Circuit	19a
D—Judgment of the United States Court of Appeals for the Third Circuit Sought to be Reviewed	39a
E—Opinion of the United States Court of Appeals for the Third Circuit on Petition for Rehearing	41a

PAGE

F—Order of the United States Court of Appeals for the Third Circuit Denying Petition for Rehearing 44a

Cases Cited

Bollenbach v. United States, 326 U. S. 607 (1946) 28

Chapman v. United States, 365 U. S. 610 (1961) 31

Cicenia v. Lagay, 357 U. S. 504 (1958) 10

Crooker v. California, 357 U. S. 433 (1958) 10

Escobedo v. Illinois, 378 U. S. 478, 12 L. Ed. 2d 977 (1964) 7-10, 31

Foster v. United States, 281 F. 2d 310 (8th Cir. 1960) .24, 25

Gallegos v. Colorado, 370 U. S. 48, 82 S. Ct. 1209 (1962) 20

Griffith v. Rhay, 282 F. 2d 711 (C. C. A. 9, 1960), cert. den., 364 U. S. 941 (1961) 20

Haynes v. Washington, 373 U. S. 503, 83 S. Ct. 1336 (1963) 12

Jackson v. Denno, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964) 10

Jones v. United States, 362 U. S. 257 (1960) 23-26

Ker v. California, 374 U. S. 23 (1964) 31

Marshall v. United States, 360 U. S. 310 (1959) 27

Massiah v. United States, 377 U. S. 201 (1964) 10

McFarland v. United States, 174 F. 2d 538 (D. C. Cir. 1949) 28

McNabb v. United States, 318 U. S. 332 (1942) 27

PAGE

Mornette v. United States, 299 F. 2d 847 (5th Cir. 1962) 25

Payne v. Arkansas, 356 U. S. 560, 78 S. Ct. 844 (1958) .20, 21

Perez v. United States, 297 F. 2d 12 (5th Cir. 1961) .. 28

Rabinowitz v. United States, 339 U. S. 56 (1950) 31

Silverman v. United States, 2 F. 2d 716 (6th Cir. 1924) 28

Sorensen v. United States, 168 Fed. 785 (8th Cir. 1909) 29

Trupiano v. United States, 334 U. S. 699 (1947) 31

United States v. Coplon, 185 F. 2d 629 (2nd Cir. 1950), cert. denied, 342 U. S. 920 (1952) 30

United States v. Donnelly, 179 F. 2d 227 (7th Cir. 1950) 28

United States v. Festa, 192 F. Supp. 160 (D. C. D. Mass. 1960) 26

United States v. Martell, 199 F. 2d 670 (3rd Cir. 1952) 28

United States v. Mullin, 329 F. 2d 295 (4th Cir. 1964) 25

United States v. Russo, 123 F. 2d 420 (3rd Cir. 1941) 29

United States v. Strickland, 205 F. Supp. 299 (D. C. E. D. Mich. 1962) 29

Watts v. Indiana, 338 U. S. 49, 69 S. Ct. 1347 (1949) .. 20

United States Constitution Cited

Fourth Amendment 24

Sixth Amendment 2, 10, 21, 23

Fourteenth Amendment 10

PAGE

Statutes Cited

Internal Revenue Code (1954) 25

18 U.S.C.:

Sec 659 ..... 2, 3, 25-27

Sec. 3502 30

26 U.S.C.:

Sec. 4704(a) 24

Sec. 5205(a)(2) 25

Sec. 5604(a)(1) 25

Sec. 7206(4) 25

28 U.S.C.:

Sec. 1254 27

Sec. 1254(1) 2

Rules Cited

Federal Rules of Criminal Procedure:

41(e) 2, 23

52(b) 27

Supreme Court of the United States Revised Rules:

40(1)(d)(2) 27

Other Authorities Cited

King, A New Constitutional Standard for Confessions, 8 Wayne L. Rev.:

481, 489 21

Jury Instructions and Forms, 27 F. R. D. (1960):

43, 195-196 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. _____

HAROLD KONIGSBERG, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Harold Konigsberg, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on August 13, 1964, which judgment affirmed a judgment of sentence of the United States District Court for the District of New Jersey of July 16, 1963, entered July 16, 1963, and filed July 17, 1963.

Citations to Opinions Below

This case was tried before the United States District Court for the District of New Jersey, Honorable Robert F. Shaw, Judge of said Court and a jury commencing on April 24, 1963, and terminating on May 24, 1963. Petitioner was found guilty of the charge of possession of goods stolen from an interstate shipment of freight, in violation of Title 18 United States Code Section 659 (Appendix A).

Prior to the commencement of the trial petitioner moved, pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure, for an Order suppressing for use as evidence all of the items seized in the fire station at 15 West 22nd Street, by agents of the Federal Bureau of Investigation on January 11, 1962. The motion was denied. It was raised again at the trial and similarly denied. The opinion of the District Court in denying the motion is printed in Appendix B hereto, *infra*, and was not officially reported. The opinion of the Court of Appeals, printed in Appendix C hereto, *infra*, has not as yet been officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on August 13, 1964. A copy thereof is printed in Appendix D hereto, *infra*. Rehearing was denied on September 18, 1964. See Rehearing Opinion of the Court of Appeals, Appendix E. The Order of the Court of Appeals in denying rehearing is printed in Appendix F hereto, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. (a) Whether the petitioner was denied the Assistance of Counsel in violation of the Sixth Amendment to the United States Constitution?

---

* Reference in parentheses refers to "Appendix A", *infra*.

(b) Whether admissions of petitioner made while in custody and after he had demanded counsel but prior to the time petitioner was permitted to consult counsel, should have been admitted into evidence?

2. Whether the petitioner had standing to move for the suppression of evidence?

3. Whether a charge on the elements of possession, including scienter, becomes nugatory, when after several hours of deliberation the jury requests a reinstruction upon possession, which the Court gives, but completely omits any reference to guilty knowledge or scienter?

4. Whether the arrest of petitioner was invalid, as being made without an arrest warrant?

Statutes Involved

The statutory provision involved is 18 U. S. C. Section 659. It is printed in Appendix A, *infra*.

Statement

The petitioner stands convicted, upon the First Count of a five count indictment returned by the Federal Grand Jury for the District of New Jersey, on a charge of unlawful possession of goods stolen from an interstate shipment of freight in violation of Title 18, United States Code, Section 659 (14a to 18a).* Prior to the trial petitioner and the other co-defendants moved for an order declaring their arrest illegal and void, and for suppression of the evidence seized at the time of their arrest on the ground that said arrest and the subsequent search and seizure were made

* "a" refers to the record abstract printed as appellant's appendix in the United States Court of Appeals for the Third Circuit, which appendix has been certified and filed with this petition as a part of the official record below.

without a warrant and without probable cause and therefore in violation of their constitutional rights and the Rules of Federal Criminal Procedure (18a to 19a). This motion made by petitioner, which was heard immediately preceding the trial, was marked by seven days of testimony and petitioner's motion was denied. A written opinion was rendered by the Court (305a to 320a) (Appendix B).

On December 21, 1961 a truck was hijacked in Parksville, New York and approximately 3,000 suits were stolen therefrom. The truck was later found in Suffern, New York (42a to 43a). This theft was the only one of such magnitude during this period of time (44a).

Several weeks after the theft an informant for the F.B.I. called Agent Parker and told him over the telephone that "there was an apparently unlimited quantity of Bond clothes available that was being disposed of in the Bayonne, New Jersey area" and it was in the area of a tavern known as the Hoo-Ha Club (94a). The agent received specific numbers which he recorded (94a). Further investigation revealed that the numbers were part of the stolen shipment (44a).

On January 10, 1962 agents of the F.B.I. took up a surveillance at about 7:30 P.M. in the area surrounding the Hoo-Ha Club. They saw a car pull into an abandoned garage across the street from the club and later on it was parked by the curb (45a to 46a). Agent Straub then walked by this car and saw several suits in the back seat which had white tags (46a, 86a). The surveillance then was called off (46a).

On January 11, 1962 Agents Straub and Tootell procured a search warrant from Commissioner Clohosey which was turned over to Agent Roetzel who was in charge between 3:00 and 5:00 P.M. Agent Roetzel had this search warrant at the time of the arrests and raid (83a; 88a to 89a).

A second surveillance was arranged for 7:00 to 7:30 on the same day of January 11, 1962. During this surveillance ten or twelve agents were used (46a; 61a). At 9:30 a car was seen being backed into the garage (47a) and some men were seen walking from the Hoo-Ha Club into the garage (47a). Thereafter, four agents stood in front of the garage for about 50 minutes (48a). The front overhead type door in the front of the garage then went up. The agents flashed lights into the building, saw clothing in piles on the floor, announced the arrests of the unknown persons in the garage from the sidewalk and then walked in where they took the men in custody and confiscated the suits (48a). The five men in the garage were petitioner and the four defendants in the trial below.

Petitioner established that at 7:30 P.M. on January 11, 1962 he was with Martin Lucarelli at the Tripoli Restaurant, Jersey City, New Jersey and from there went to the Hoo-Ha Club in search of Joseph Pope who owed him money (202a to 203a). Upon discovering that Pope was not at the club, he left and returned about 9:30 P.M. (202a). At the club he was told that Pope was across the street in the garage (204a), so he went to the garage looking for Pope. Once inside the garage and while walking towards the station wagon, the lights went out suddenly so he went against the wall, the front door went up, and he heard voices saying "This is the F.B.I." (206a to 207a) and was ordered to put his hands against the wall but he protested so he was handcuffed. While in the garage he heard the agents tell someone who was not arrested "Weren't you told" * * * "All right, get out of here" (207a). He asked for his lawyer and when denied the opportunity to call him, told the agents he was being framed (209a). His denials of knowledge as to what was in the garage and what was going on in the garage were categoric (210a to 213a).

Martin Lucarelli corroborated Konigsberg's testimony as he was with Konigsberg from the time they met in his office until the second time he and Konigsberg went to the Hoo-Ha Club that evening and Konigsberg then went across the street to the garage (230a to 234a).

This Court must note the chronology of events with regard to petitioner being deprived of his right to counsel by agents of the F.B.I. Agent Straub admitted that very possibly upon being placed in an F.B.I. vehicle upon arrests, petitioner asked permission to call his lawyer (TR. 862).*

The arrest unquestionably took place at 9:30 P.M. on January 11, 1962. While enroute from Bayonne to Newark, petitioner asked permission to make a telephone call; the F.B.I. agents refused to allow him to do so (TR. 879, 882). By Agent Straub's own testimony, petitioner made four or five requests to call his lawyer, but notwithstanding the agents remained adamant and refused to allow petitioner to make the call (TR. 883, 884, 887, 889). Agent Straub's reason was that the F.B.I. wanted to give petitioner a chance to "cleanse himself", "what were his (petitioner's) reasons for being (in the garage)"; the F.B.I. wanted "to hear his (petitioner's) side of the story that would come from him ..." (TR. 865).

Only after the extended "conversation" as Agent Straub classically put it, was petitioner allowed to call his lawyer (TR. 864). This permission was given to petitioner at approximately 1:30 a.m. on January 12, 1962 (TR. 882), *four hours after petitioner had made the initial request, and after four hours of extended "conversation" had been thrust upon him by the F.B.I.*

---

*"TR" refers to those pages of the trial record in the particular volumes of the trial record which have been certified to this Court by the Court of Appeals below, and filed directly with this Court upon Petitioner's motion.

Admitted into evidence at the trial over petitioner's objection was testimony that petitioner had said to Agent Straub, prior to the time that the permission was given for petitioner to call his lawyer, and during the four hours of extended "conversation" that:

> "* * * This is the first legitimate arrest the F.B.I. ever had me for . . . That is one thing you guy (sic) have that I don't have, stool pigeons." (116a)

Petitioner is alleged to have said next that he wasn't in the garage, and then said he was in the garage, trying to "help a guy out" (117a).

Under the trial court's examination, *Agent Straub admitted that the foregoing remarks of petitioner were made before he was allowed to call his lawyer.* (TR. 890, 891), and candidly admitted, as he had to, that despite four or five requests they would not let him call his lawyer (TR. 900, 901).

Reasons for Granting the Writ

1. This Court should grant the petition for a writ of *certiorari* because of the importance of the questions raised by the manner in which the Court of Appeals, Third Circuit, has interpreted *Escobedo* v. *Illinois*, 378 U. S. 478, 12 L. Ed. 2d 977 (1964). Petitioner contends that the facts of this case fall squarely within the ambit of *Escobedo*, as *decided by this Court*, and contends that the Court of Appeals has in effect vitiated this Court's holding in *Escobedo*, by engrafting upon the holding additional requisites which were never intended. The opportunity should be taken by this Court to reiterate its exact and specific holding in *Escobedo*, before other Circuit Courts of Appeal follow the Court's decision below, and magnify the error.

The Court below has erroneously construed *Escobedo* to be applicable only when: (1) the process is accusatory; (2) an attempt is made to elicit a confession; and (3) the facts (i.e.) an uneducated individual of foreign extraction, a promise of immunity in exchange for testimony, a promise to be released from custody in exchange for a written statement implicating someone, etc., are almost the same as in *Escobedo*. (Adv. Op. p. 15 to 16*), (Adv. Op. on Petition for Rehearing P. 2), Appendix E, *infra*. This Court held in *Escobedo* that:

> "* * * (When) the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer . . . the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." 378 U. S. 478, 12 L. ed. 2d, 977 at 986.

Even in the dissent, Mr. Justice WHITE, joined by Mr. Justice CLARK and Mr. Justice STEWART recognized the foregoing when Mr. Justice WHITE stated:

> "At the very least the Court holds that once the accused becomes a suspect and, presumably is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel." Dissenting opinion of Mr. Justice WHITE, 378 U. S. 478, 12 L. ed. 2d at 989.

---

* Reference is to pages of the Court of Appeals, Third Circuit, opinion as set forth in Appendix "C", *infra*.

The petitioner was a suspect, he was arrested, he was interrogated by the F.B.I., as they evasively put it "in conversation", admissions allegedly made by petitioner were used in evidence over his objection. *The petitioner did not waive counsel; he asked for counsel four or five times and was prohibited from calling his lawyer, until the damaging "conversation" was concluded to the satisfaction of the F.B.I.*

That procedure was clearly accusatory; this Court did not hold that there had to be an attempt to "extract" a confession, or that the accused had to be of a background and in a quandary similar to Danny Escobedo. By so holding below the Court of Appeals has emasculated *Escobedo* just as though it had never been decided by this Court. The Courts of Appeal must follow this Court in letter and in spirit, and not indulge in inordinate and unwarranted fact distortion so as to evade implementing the protections of the United States Constitution, as enunciated by this Court.

F.B.I. Agent Straub testified that, following petitioner's arrest, he informed petitioner of his right to counsel, that he was under arrest, and anything said by petitioner could be used against him (74b)*. Significantly, there was no warning of petitioner's "*absolute constitutional right to remain silent.*" *Escobedo, supra*, 378 U. S. 478, 12 L. Ed. 2d 977 at 986. Petitioner could not make any calls until the agent *heard his story* (75b to 77b). In such a posture, petitioner urges that the "admissions" were in effect involuntary, and that their use in evidence against him, over

---

* "b" refers to the record abstract printed as appellee's appendix in the United States Court of Appeals for the Third Circuit, which appendix has been certified and filed with this petition as a part of the record below.

objections, were prohibited not only by *Escobedo, supra,* but also by the holding of this Court in *Jackson* v. *Denno,* 84 S. Ct. 1774, 12 L. Ed. 2d 908, 915 (1964).

In *Massiah* v. *United States,* 377 U. S. 201 (1964) this Court read the Sixth Amendment as barring the Government's use of an indicted defendant's incriminating statements made, while out on bail and in the absence of counsel, to a co-defendant and that were surreptitiously recorded by the police with the assistance of the co-defendant. As a matter of fact, the statements were made while sitting in an automobile parked on a New York street.

Shortly afterwards, this Court used the *Massiah* holding as a jumping-off point to overrule *Crooker* v. *California,* 357 U. S. 433 (1958) and *Cicenia* v. *Lagay,* 357 U. S. 504 (1958). The rule now is that police refusal, during interrogation conducted while a suspect is in custody, to grant his request to consult with his attorney after they fail to effectively warn him of his right to remain silent constitutes a denial of his constitutional right to counsel and renders any statement elicited from his inadmissible in a state prosecution. *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), *supra.*

The admission into evidence of petitioner's pre-trial statement was a denial of his right to due process guaranteed by the United States Constitution, Amendments VI and XIV, because the totality of circumstances surrounding the obtaining of the statement by the interrogating police deprived petitioner of his Constitutional rights. The circumstances consisted of a confluence of the following factors, each of which, either singly or in combination with others, have resulted in previous holdings that due process had been denied.

The following factors are in the record:

(a) The denial of the right of the petitioner to consult with his counsel after demanding to consult with him;

(b) The failure to advise petitioner of his Constitutional rights, included the right to counsel and the right against self incrimination;

(c) The incommunicado detention of petitioner who was seen only by agents of the Government.

When viewed in light of the totality of all these circumstances it is clear that the resulting statement was obtained in contravention of petitioner's Constitutional rights and its admission into evidence resulted in the denial of due process to the petitioner.

Wholly apart from the many other factors present, the unlawful denial of the request of petitioner to consult with his counsel, rendered his subsequent statement inadmissible in evidence against him at the trial. The right to counsel, if it is to have any efficacy at all, must obtain when the need for the advice of counsel is crucial. Nowhere is the necessity for the advice of counsel more crucial than where the police, either pursuant to correct legal procedures or in contravention of such, have a suspect under their absolute control in a situation where the result of such an interrogation can render any subsequent assistance of counsel wholly illusory. If the police, through the device of postponing a suspect's opportunity to consult with his attorney, can obtain a statement from the suspect with no external protections except their own self-restraint, then the suspect's rights to be free from testimonial self-incrimination and to be rendered the assistance of counsel are valueless.

The factual complex of this case raises the issue of the permissible libits to which law enforcement officers may go before they transgress the inalienable rights to due process guaranteed to all accused by the Fourteenth Amendment of the United States Constitution. It is well recognized that a statement of an accused obtained while in police custody will be inadmissible in evidence if the statement has not been elicited freely, voluntarily, and without compulsion or inducement of any sort. (*Haynes* v. *Washington*, 373 U. S. 503, 83 S. Ct. 1336 at 1343, and cases cited therein (1963). The substance of this test of "voluntariness" has come to be measured by an examination of all the attendant circumstances (*Haymes* v. *Washington*, *supra*, 83 S. Ct. at 1343, especially footnote 10 therein) and if "constitutionally impermissible methods" have been used to assist in obtaining it, these factors weigh heavily on the question of the admissibility of the statement into evidence.

In the case at bar, when petitioner was arrested by the F.B.I. he entered the interrogation process intent on making no statement. Yet at the end of the accusatory process, a statement was obtained. It is inescapable that the statement that resulted thereof was the product of the interplay of various improper pressures, and its admission into evidence resulted in a denial of petitioner's right to due process of law.

F.B.I. agent Robert M. Straub's testimony is corroborative. When called as a witness in behalf of the Government he testified he placed petitioner in an F.B.I. automobile and both he and agent Roetzell proceeded back to the Newark F.B.I. office with appellant (Tr. 840).

Agent Straub summarized what had transpired. He informed petitioner that he was entitled to an attorney and that anything he said might be held against him and that he was under arrest (Tr. 841). When the agents arrived

in Newark they questioned appellant as to why he was in the garage and as to what had taken place (Tr. 844).

This colloquy between the F.B.I. agent and the prosecutor is illuminating (Tr. 851):

"*By Mr. Satz*:

Q. May I ask you, did you take any statement from the witness, the defendant Konigsberg? A. Verbal statements.

Q. Did you make any notations as to the matters included in such verbal statements? A. Yes.

Mr. Brown: At this time, if your Honor please, I demand a notation if it was written."

* * *

(Tr. 852):

"Q. Did you take any notes as to the circumstances, conditions or time at which you asked these questions of Mr. Konigsberg? A. I did. In your question as to time you mean the time of—"

* * *

(Tr. 855):

"Q. Did you ask Mr. Konigsberg any questions whatsoever at any time after he got into the automobile with you? A. Before or after I had advised him of his rights to an attorney?

Q. At any time did you ask him any questions after he got into the automobile with you? A. I don't really recall if I asked him any questions or not, myself."

The following testimony of agent Straub supports petitioner's position (Tr. 862):

"Q. Did Mr. Konigsberg at any time ask for his lawyer, ask to get in contact with him or make any

statement about any legal protection?' A. He asked for that. He informed us he wanted to call his attorney.

Q. When did he make that statement to you? A. I can't recall the exact time.

Q. Isn't it a fact that this statement was made to you while en route to Newark in the automobile? A. He very possibly could have said it in the automobile. I don't really recall.

Q. Was he allowed to call his attorney at that time or obtain legal counsel or any aid or assistance? A. He was allowed to call his attorney.

Q. When was that? A. When we had reached—after we had reached the Newark office.

Q. Do you mean after you arrived at the Newark office and completed your questioning and investigation?"

• • •

(Tr. 864):

"A. We didn't question him for some time.

Q. Wasn't it then you questioned him? A. We had a conversation.

Q. Wasn't it after the conversation that you then allowed him to call his attorney? A. The conversation did not end. We continued to talk after he—

Q. Was it after considerable conversation and after you had obtained from him the information that you wanted that you then allowed him to call his attorney?"

• • •

"Q. It was after the conversation with him that you allowed him to call his attorney? A. It was after we had had some conversation that he called his attorney.

Q. Was he given permission to call his attorney prior to the time or was this the first time he was allowed to call?"

(Tr. 865):

"A. He called his attorney only once.

Q. My question was was this call made on your permission? He was under arrest, wasn't he? A. He was.

Q. So the call was made when you gave him permission to call, isn't that right? A. That is right.

Q. Now, originally you had told him he was entitled to counsel, had you not? A. Yes.

Q. Why did you not let him immediately obtain counsel instead of waiting until after the conversation to let him call?

Mr. Satz: Objection, your Honor.

The Court: Overruled.

A. We desired to talk and see if he wished to cleanse himself or explain.

Q. Give explanations as to what? A. As to why he was there, what his reasons for being there were, why the other individuals were there.

Q. If he could explain? A. If he could explain. We wanted to hear his side of the story that would come from him, if it would. We had to fingerprint Mr. Konigsberg. We had to photograph him."

On cross examination, F.B.I. agent Straub testified as follows (Tr. 878):

"Q. Now, you told us that on his entering the car in Bayonne shortly after 10:35 Konigsberg was told he had a right to counsel, is that right? A. When he was sitting in the car and before we left Bayonne he was advised of the right to have counsel and the fact that any statement he made would be used against him in court.

Q. Wasn't he further told he was entitled to an attorney before discussing the matter?"

(Tr. 879):

"A. Yes.

Q. And this was shortly after 10:35, is that correct?

A. Yes.

Q. Is it not a fact that he asked you for an opportunity to get in touch with his attorney shortly after you gave him this information? A. Well, I can recall that he asked to make a phone call, but to the best of my recollection he did not specify to whom he wished to call.

Q. When did he make this request of you, if you can remember? A. This was while we were riding in the automobile.

Q. Was he given an opportunity to make the phone call? A. No, he was not.

Q. Is it not true that the phone call came shortly after you told him he was entitled to have an attorney prior to—"

* * *

(Tr. 882):

"Q. At the time he requested that he be allowed to make a phone call was he allowed to make the phone call? A. He was not allowed to make a call.

Q. And isn't it a fact that in spite of request made by him for the right to call counsel that he was not permitted to call until the next morning, January 12?

Mr. Satz: Here we go. The term 'phone call' has now been a leading question that he's been allowed to ask, a leading question, phone call to counsel.

The Court: I will overrule the objection.

A. He did not call his attorney until January 12.

Q. And could you tell us approximately what time he was allowed to make the call? A. It was between 1:00 o'clock and 1:25 a.m., or 1:30, somewhere in between those hours."

• • •

(Tr. 883):

"Q. How often had he asked for the right to call an attorney prior to the time you permitted him to call at 1:20? A. Well, I would say four or maybe five times."

• • •

(Tr. 884):

"Q. But you do remember, as you just testified, that it was about four or five times that he made the request? A. I would say he mentioned that many times."

• • •

(Tr. 886):

"Q. If you just read it to yourself and advise me as to whether on your report it does not state therein that he was advised of his right to counsel before he discussed the matter. A. He was entitled to an attorney before discussing the matter.

Q. When you got to Newark, isn't it a fact that he asked you for the right to advise with counsel before he discussed the matter?

Mr. Satz: This is repetitious right now.

Mr. Brown: It's not repetitious. This is the heart of the matter.

The Court: I will allow it."

A. As I said, he asked to call his attorney.

Q. If you had already told him that he had the right to advise with counsel before discussing the matter,

why didn't you give him this right instead of denying it to him?"

(Tr. 887):

"A. There were certain things. He wanted to give him a chance to give his explanation as to why he was in the garage and why the other people were in the garage. We had certain administrative functions that we are requested to pursue, which was done. We found $11,000 on his person which we had to count and make sure that we were not in error, and that he was not in error, and that took some time to do."

• • •

(Tr. 889):

"A. Would you repeat your question?

(Question read back.)

A. Yes.

Q. You did allow him to call counsel? A. No. The answer—I understood your question to say, 'you did not.'

Q. That is right, and you did not, isn't that right? A. That is right.

Q. So therefore you denied him his right to call counsel before discussing the matter even though you had recognized this right yourself, isn't that so?"

F.B.I. Agent Straub's testimony clearly established the custom of the F.B.I. to refuse to allow a suspect's attorney to confer or consult with him. The foregoing recitations of the Trial Record indicate unequivocably that the arresting officers who testified in the instant trial, definitely refused to allow petitioner to consult with his attorney although repeated demands had been made therefor. Accordingly, the record uncontrovertedly demonstrates that

petitioner had requested to consult with his attorney on numerous occasions but these requests were unlawfully and unconstitutionally refused prior to the time that the petitioner made any oral admissions or statements.

The following colloquy which ensued between the Court and witness-agent Straub is further illuminating when we consider the following excerpt from the Trial Record (Tr. 890):

> "The Court: Agent Straub, I take it that you are familiar now with the excerpts of the statements allegedly made by Mr. Konigsberg at the F.B.I. office during the course of this discussion?
>
> The Witness: Yes, sir.
>
> The Court: Were those statements made by Mr. Konigsberg before he was allowed to call counsel?
>
> The Witness: It is hard to say, your Honor. I would say yes, probably yes.
>
> The Court: Correct.
>
> Q. Now, you have told his Honor that these statements were made before this man was allowed to call counsel. You understand, is that correct? A. Yes." (Tr. 891)

On cross-examination, Agent Straub freely admitted depriving petitioner of counsel (Tr. 900):

> "Q. And you told us that he asked four or five times for counsel throughout the interview? A. I know that he asked for counsel, yes.
>
> Q. And he was denied it these three, four or five times prior to the call permitted at 1:20? A. He called the one time at 1:20.
>
> Q. But you have told us he requested it prior and he did not call? A. That's right. *We told him not to call.*

Q. *He was denied that right, then?* A. *Yes, yes.* Q. So there was something which he was denied that he asked for, and that was the right to call counsel, isn't that right? A. I don't see that the one conclusion leads to another. He did call counsel." (Emphasis added.)

In *Gallegos* v. *Colorado*, 370 U. S. 48, 82 S. Ct. 1209 (1962), this Court held that the failure to inform the accused of his rights had the same effect upon that accused as if he had no rights. It was there determined that advice as to his rights "from someone concerned with securing him those rights" would have put that accused "on a less unequal footing with his interrogators" (370 U. S. at 54, 82 S. Ct. at 1212). The confession of that accused was held to be inadmissible because no one had offered such advice. See also *Griffith* v. *Rhay*, 282 F. 2d 711 (C. C. A. 9, 1960), cert. den. 364 U. S. 941 (1961), where this Court stated:

"In our opinion Griffith was so prejudiced by not having the advice of counsel on the afternoon of October 11, 1956. No one told him at that time that he did not have to submit to interrogation. * * * Had he been represented by an attorney on that occasion Griffith would have without doubt been advised that he need not talk. * * *"

In *Watts* v. *Indiana*, 338 U. S. 49, 69 S. Ct. 1347 (1949), this Court, in pointing to a number of factors which vitiated the confession, included the fact that "the petitioner * * * was without friendly or professional aid and without advice as to his constitutional rights" (338 U. S. 49 at 53, 69 S. Ct. 1349). In *Payne* v. *Arkansas*, 356 U. S. 560, 78 S. Ct. 844 (1958) one of the factors enumerated as bearing on the "totality" of circumstances was that

Payne "was not advised of his right to remain silent or his right to counsel." (356 U. S. at 569, 78 S. Ct. at 850).

In the case at bar, it was the act of the Federal Agents, in denying the attorney-client consultation, until a damaging statement or admission was forthcoming, that caused the petitioner to be deprived of his constitutional right to the assistance of counsel as mandated and prescribed by the Sixth Amendment to the United State Constitution and all decisional precedents herein.

Once petitioner was arrested he was taken to the Federal office and was not allowed to consult with anyone until he gave a statement. The fact that the petitioner succumbed to the effect of incommunicado detention, having no doubt that there was no time limit set on the length of secret police interrogation, does not detract from the coercive nature of the arrest and detention. Indeed, the fact that petitioner submitted the incriminating statement within hours despite his inclination to the contrary merely buttresses the efficacy of this coercive practice. It is just as effective a means of psychological coercion to arbitrarily deny a suspect a right he knows he has than not to tell him of his rights at all. King, commentating in A New Constitutional Standard for Confessions, 8 Wayne L. Rev. 481 at 489 wrote:

> "In seeing his rights callously disregarded, the accused may well despair of ever realizing the benefits of those rights or of a fair proceeding. Under the circumstances, standing alone before the awesome forces of the criminal law he may feel that the constitutional rights he knows of will not be made available to him * * * It seems clear that the benefits of constitutional rights are not effectuated merely by guaranteeing that the accused shall know of them—he must be also able to exercise them."

In the case at bar, Federal Agent Straub testified on direct examination that he placed petitioner in an F.B.I. auto and proceeded to the F.B.I. office (74b). He further testified he informed petitioner "that he was entitled to an attorney and that anything he said might be used against him in a Court of law, that he was under arrest" (74b). On cross-examination, Agent Straub admitted that although he advised petitioner of his right to counsel he did not permit him to make any calls until he could hear petitioner's side of the story (75b-77b). Simply advising petitioner of his right to counsel and that anything he may say might incriminate him has a hollow meaning when we consider the following testimony of Agent Straub (76b):

> "Q. If you had already told him that he had the right to advise with counsel before discussing the matter, why didn't you give him this right instead of denying it to him? A. There were certain things. We wanted to give him a chance to give his explanation as to why he was in the garage and why the other people were in the garage."

* * *

(78b):

> "Q. Now, you state that he was fingerprinted, photographed at 1:06, leaving the time between 12:25 and 1:06 as the time that you listed 'continued talking'. During that time, what were you doing, asking questions of Mr. Konigsberg? A. I probably asked a few but actually it was more like a conversation than an interview.
>
> Q. And during this discussion did you in any way threaten Mr. Konigsberg or extract from him any answers? A. No. I did not threaten Mr. Konigsberg.
>
> Q. How were these statements that were given by him made? A. This was just a discussion back and forth, at which time he volunteered these statements."

While the agent testified he did not threaten or extract from petitioner Konigsberg any answers, the result remains the same, in that the agent refused to permit petitioner to telephone a lawyer for the purpose of consultation in accordance with petitioner's multiple requests therefor, thereby depriving the petitioner of his constitutional and statutory rights to the "Assistance of Counsel" (Sixth Amendment, U. S. Constitution). The Trial Court found the statements made by the petitioner to be of a voluntary nature (79b-80b). It is the petitioner's contention that his statements were involuntary and that he was not advised of his right to counsel or of his right to remain silent. Assuming, *arguendo*, that he was so advised, the denial of counsel to appellant after vainly protesting his right to counsel, is prejudicial because to be advised of such rights and not to permit petitioner to exercise these rights, the combination of which, ought to render statements thereafter obtained inadmissible. It goes without saying that if the petitioner had been allowed to consult with counsel, he would have been advised by counsel of his right to remain silent and he would have been advised by counsel to exercise that right.

2. This Court should review the decision of the Court of Appeals to settle the law as to whether a defendant in a federal criminal trial has standing, under Rule 41 (e) of the Federal Rules of Criminal Procedure to move for suppression of evidence, when a charge of "criminal possession" of an item has been made against him. It is an issue vital to the effective administration of criminal justice in the federal courts, and one of frequent recurrence. It is urged that the court below has read into *Jones* v. *United States*, 362 U. S. 257 (1960) a curtailment or restriction of its rationale that was never intended by this Court. The decision of the Court of Appeals has also resulted in a conflict among the various circuits, which this Court should resolve.

The Court below held that petitioner did not have standing to move for suppression of evidence because the "abandoned" building in which petitioner was arrested, and his presence therein, was not protected by the Fourth Amendment. The Court then went on to state that the charge of possession of stolen goods did not give petitioner the requisite standing to move for suppression. The Court's rationale was stated thusly:

> "Nor does the ambivalent argument that possession of the stolen clothes in the defendant 'eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged.' Jones p. 263. That holding was specifically directed to the sui generis problem before the Court as to which the latter held p. 263. 'The same element in this prosecution (narcotics) which has caused a dilemma i.e. possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, *which ordinarily is required when standing is challenged.*" (Emphasis added.) (Adv. Op. Page 6), Appendix B, *infra.*

Petitioner contends that *Jones, supra,* is not limited to prosecutions under 26 U.S.C. Section 4704 (a), or associated statutory provisions of the narcotics laws, and that a charge of possession of any item, which possession forms one of the bases of the criminal charge, is in and of itself enough to confer standing upon one to move for suppression. The Eighth, Fourth and Fifth Circuits have so held, as has the United States District Court for the District of Massachusetts.

In *Foster* v. *United States,* 281 F. 2d 310 (8th Cir. 1960) the appellant was convicted of possession of an adding

machine stolen from an interstate shipment of freight, in violation of 18 U.S.C. Sec. 659. It had been found in his wife's tavern, and he had admitted use of it, as well as its purchase. Appellant's motion to suppress was denied. The Court held it was error, reversed the conviction, and citing *Jones* v. *United States*, *supra*, set forth, *inter alia*, one of the reasons for the reversal:

> "We think the defendant, despite somewhat vague and elusive connection with the tavern cannot be said, as a matter of law, to have been without 'standing' to complain of the introduction into evidence of the stolen adding machine, *with the possession of which he was charged.*" 281 F. 2d at 312 (Emphasis added.)

The *Jones* rationale has been extended to cases involving the possession of non-tax paid alcohol, under 26 U.S.C. Section 7206 (4). That statute, coupled with other sections of the Internal Revenue Code of 1954, such as 26 U.S.C. Section 5205 (a) (2) and 5604 (a) (1) proscribe not the mere possession, removal, concealment or deposit of such alcohol, but proscribe those acts "*with the intent to evade or defeat the assessment or collection of any tax imposed* * * *" 26 U.S.C. Section 7206 (4). A specific intent to evade taxes is an essential statutory element of the offense.

Nonetheless, the mere possession, which alone would not convict, has given rise to standing to move for suppression. See, for example, *United States* v. *Mullin*, 329 F. 2d 295 (4th Cir. 1964) wherein the Court stated:

> "Preliminarily, we find that defendants were charged with a possessory crime and each had proper standing to file a motion to suppress. Jones v. United States, 362 U. S. 257 * * *" 329 F. 2d at 296. See also, *Monnette* v. *United States*, 299 F. 2d 847, 849 (5th Cir. 1962).

In *United States* v. *Festa*, 192 F. Supp. 160 (D. C. D. Mass. 1960), the defendant moved for suppression of certain envelopes and papers taken from their persons during the execution of a search warrant upon a store. (No warrants had issued for the arrest or search of either defendant.) Each defendant was charged with violation of the wagering tax act, in that they had not procured their $50.00 annual stamps. *Possession of the papers and envelopes was not the crime charged.* The Government would ultimately have to have proved that the defendants accepted wagers without buying the required stamps. With respect to the element of standing to move for suppression, the learned Judge WYZANSKI stated:

> "Where the Government predicates the alleged guilt of a defendant upon his possession of an item * * * the defendant has the status to petition for the return and suppression of the item." 192 F. Supp. at 164.

While proof of possession alone under 18 U.S.C. Sec. 659 will not convict, as a practical matter this element usually swings the balance. Elements of this offense such as the theft, interstate commerce and value of the goods are in reality only technical matters to confer jurisdiction for the offense upon the Federal Court. The main thrust of the offense, which secures the conviction is the possession itself, due to the availability by the Government to have the jury instructed to the effect that possession of recently stolen property, if not satisfactorily explained, is a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances that the person in possession knew the property had been stolen. See *Jury Instructions and Forms*, 27 F. R. D. 43, 195, 196 (1960) and cases cited therein. Such an instruction was given to the jury in the instant case (259a to 260a). For all of these reasons, petitioner urges that a clarification of *Jones*, *supra*, by this Court is imperative.

3. This Court is responsible for the judicial supervision of the administration and enforcement of criminal justice in the Federal Courts. *McNabb* v. *United States*, 318 U. S. 332 (1942); *Marshall* v. *United States*, 360 U. S. 310 (1959). Under its supervisory powers, this Court should review the charge of the trial court, to determine whether, as contended by petitioner, the portion complained of constituted plain error as encompassed by Rule 52 (b) of the Federal Rules of Criminal Procedure and Rule 40 (1) (d) (2) Supreme Court of the United States Revised Rules, 28 U.S.C. Section 1254, *et seq.*

The omnibus conclusion of the Court below disposed, *inter alia*, of petitioner's attack upon the charge of the trial court as "without merit and need of discussion". (Adv. Op. p. 17), Appendix C, *infra*. The issue was raised again in a petition for rehearing, and similarly disposed of (Adv. Op. on Petition for Rehearing, p. 3), Appendix E, *infra*. It is submitted that on each occasion the Court below has ignored a most critical and substantial issue, *timely raised by petitioner at trial*, with regard to the trial court's completely erroneous and contradictory supplemental charge to the jury on the vital elements of possession and guilty knowledge, in this prosecution under Title 18, United States Code, Section 659, which reads in pertinent part, as follows:

> "Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are part of or which constitute an

interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen."

The initial charge of the Court as to guilty knowledge was correct (250a). The jury then deliberated from 1:32 P.M. on May 23, 1963 to 3:30 P.M., without reaching a verdict, when a request was then made by the jury to the judge to redefine possession (289a, 292a and 294a). The Court then gave its charge on actual and constructive possession (294a to 296a). This was the charge that totally failed to state that possession, for purposes of the charge in this case, statutorily meant possession of goods with knowledge that the goods were stolen. The instruction was clearly erroneous on its face, and contradictory to the earlier charge.

The jurors then deliberated with this erroneous second charge to guide them as to the law for approximately nine hours or until 12:55 a.m. on May 24, 1963. They retired for the night, presumably resumed deliberations at 10:00 a.m. and at 11:45 a.m. the same morning the jurors returned their verdicts. Without reiterating all of the argument below, it is urged that the question presented is so serious and genuine, that this Court should examine the issues raised by these jury instructions and the applicable cases of *McFarland* v. *United States*, 174 F. 2d 538 (D. C. Cir. 1949); *United States* v. *Donnelly*, 179 F. 2d 227 (7th Cir. 1950); *Perez* v. *United States*, 297 F. 2d 12 (5th Cir. 1961); *Silverman* v. *United States*, 2 F. 2d 716 (6th Cir. 1924); and in particular *Bollenbach* v. *United States*, 326 U. S. 607 (1946) and *United States* v. *Martell*, 199 F. 2d 670, 672 (3d Cir. 1952). For purposes of argument herein,

it is contended that the supplemental charge confused the jury, caused them to ignore the original accurate charge and ultimately forced the jury into a misconception of the law, thereby depriving the appellant of a fair, intelligent, and honest verdict untainted by obvious mistake!

The initial charge of the trial court (256a) and the subsequent charge (295a) were in additional conflict and further error committed in that the latter in effect told the jury that constructive possession, without more, would permit the jury to draw an inference of guilty knowledge (259a to 260a). The law is clearly otherwise. See, *United States* v. *Russo*, 123 F. 2d 420 (3d Cir. 1941); *United States* v. *Strickland*, 205 F. Supp. 299 (D. C. E. D. Michigan 1962); *Sorensen* v. *United States*, 168 Fed. 785, 798-99 (8th Cir. 1909).

As was stated in *Sorensen, supra*:

> "A constructive possession, like constructive notice or knowledge, though sufficient to create a civil liability is not sufficient to hold a party responsible to a criminal charge." 168 Fed. at 798.

The trial court clearly erred and the verdict is manifestly tainted. The jury should have been instructed that other *indicia* or *scienter* were requisite to a finding of constructive possession before a verdict of guilty was justified.

4. The Court below has apparently concluded that petitioner's sole attack upon his arrest was that it was made without probable cause (A lv. Op. P. 7), Appendix B, *infra*. Petitioner submits that this is a misconception of his argument, which in essence was two fold. It was, as outlined below: 1) that the arrest was without probable cause and; 2) that the arrest was invalid because it was made without a warrant.

The Government apparently satisfied the United States Commissioner at Newark, New Jersey as to the requisites of probable cause, for on January 11, 1962 the Commissioner issued a "night time" warrant to search the building at 15 West 22nd Street, Bayonne, New Jersey. The agents of the F.B.I. knew petitioner's codefendants by their reputations and as residents of Bayonne. Agent Straub, on January 10, 1962, the night before the arrest, saw Juliano walk in and out of the firehouse, and saw another man as well, driving a car with suits contained in the back seat. The suits sold in the area were known to the F.B.I. to have been part of the hijacked shipment. Under the circumstances and with the question of practicability not in issue, it was incumbent upon the Government to obtain arrest warrants, even "JOHN DOE" arrest warrants at the time the search warrant was procured on January 11, 1962.

In *United States* v. *Coplon*, 185 F. 2. 629 (2d Cir. 1950), *cert. denied*, 342 U. S. 920 (1952), agents of the F.B.I. had a similar though actually even greater abundance of facts to constitute probable cause to obtain an arrest warrant for Judith Coplon. They had in addition, all the time in the world, and all the requisite manpower to do so, yet no arrest warrant was procured before Judith Coplon's arrest. As a result, the arrest was ruled invalid and the fruits of the incidental search of her person suppressed.

With specific reference to 18 U.S.C. Sec. 3502 as it then existed, Circuit Judge LEARNED HAND stated:

> "The statute (18 U.S.C. Sec. 3502) requires a warrant when there is time to obtain one, the dispensation is limited to occasions when it is not safe to wait." 185 F. 2d at 635.

Today, 18 U.S.C. Sec. 3502, as amended, fails to contain any provision that an arrest warrant may be dispensed with if there is belief that the suspect will escape or flee.

It appears to the writer to be an *a fortiori* proposition, that in the case at hand, the F.B.I. agents, claiming to know all that they did know on the afternoon of January 11, 1962, and being at the office of the United States Commissioner at Newark, New Jersey, were duty bound to obtain, at least as to Juliano, an arrest warrant in his name, and a "JOHN DOE" arrest warrant for the other man the F.B.I. saw driving away in a car with suits from the firehouse. With the proximity of Bayonne and Jersey City, New Jersey, there is, additionally, no reason why warrants for arrest for all the individuals observed entering the firehouse could not have been applied for in the name of John Doe or otherwise, in Jersey City, immediately upon seeing a group of men leave the Hoo-Ha and enter the firehouse at 9:30 P.M. on January 11, 1962.

The opportunity, availability, and practicability of obtaining a warrant, for arrest or a search, has run the gauntlet from *Trupiano v. United States*, 334 U. S. 699 (1947) to *Rabinowitz v. United States*, 339 U. S. 56 (1950), to *Chapman v. United States*, 365 U. S. 610 (1961) and *Ker v. California*, 374 U. S. 23 (1964). As the law stands today, petitioner submits that the Constitutional Command is that if a warrant may be obtained, *it must be obtained* and utilized.

Since the decisions of the several Circuits may well be in conflict with one another, it is incumbent upon this Court to resolve the conflict to create a consistent rule or yardstick. The case at bar is deemed so important and epitomizes the myriad problems which beset the field of "right to counsel" deprivations. This Court has never precisely set forth the basis upon which the federal tribunals predicate their interpretation of the constitutional and statutory right to counsel as in *Escobedo*. In the absence of a Congressional enactment, an unequivocal explanation by

this Court to clarify and justify this apparent conflict would be salutary; therefore, this Court should assume jurisdiction and grant the writ of certiorari.

Certiorari is further sought on the grounds that the Court of Appeals has rendered a decision on an important question of Federal Law in conflict with applicable decisions and controlling case law; has decided an important question of Federal law which should be clarified and made more definite and certain by this Court; has decided a Federal question of substance not theretofore determined by this Court; has decided said question in a way probably not in accord with the applicable decisions of this Court and with other Circuits; and or because of the importance of the question for the administration of criminal justice in the Federal Courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL A. QUERQUES,
AND
DANIEL E. ISLES,
Attorneys for Petitioner.

Dated: October 15, 1964.

APPENDIX A

Statutory Provisions Cited and Quoted (18 U. S. C. Section 659—Interstate or Foreign Baggage, Express or Freight; State Prosecutions)

§659. Interstate or foreign baggage, express or freight; state prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce

or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made.

A judgment of conviction or acquittal on the merits, under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. June 25, 1948, c. 645, 62 Stat. 729, amended May 24, 1949, c. 139, § 15, 63 Stat. 91.

APPENDIX B

Opinion and Order of the United States District Court for the District of New Jersey Denying Petitioner's Motion for Suppression of Evidence

OPINION OF SHAW, U. S. D. J., ON TRIAL MOTION TO SUPPRESS EVIDENCE, ETC. (JULY 10, 1963)

Appearances:

DAVID M. SATZ, JR., ESQ.
United States Attorney

RAYMOND A. BROWN, ESQ.
Attorney for Defendant, Harold Konigsberg

S. M. CHRIS FRANZBLAU, ESQ.
Attorney for Defendant, Joseph Juliano

FREDERICK KLAESSIG, ESQ.
Attorney for Defendant, John Joseph Zax

MICHAEL A. QUERQUES, ESQ.
Attorney for Defendant, Joseph Celso

LOUIS J. GREENBERG, ESQ.
Attorney for Defendant, Joseph Nalewajka.

SHAW, U. S. D. J.:

Upon consideration of the text of the transcript of the oral opinion disposing of the motion to suppress evidence in this matter, it is felt that it should be edited and restated to read as follows:

Appendix B

The defendants are charged by Indictment with violation of Title 18, U. S. Code, Sections 659 and 2315. The offenses are alleged to have occurred on or about January 11, 1962. The goods in question consisted of men's suits, coats, and wearing apparel. The premises involved in this case are located at 15 West 22nd Street, Bayonne, New Jersey.

On the night of January 11, 1962, the defendants, Harold Konigsberg, Joseph Juliano, Joseph Celso and Joseph Nalewajka, were arrested by Agents of the Federal Bureau of Investigation while these defendants were on premises at 15 West 22nd Street, Bayonne, New Jersey, and men's wearing apparel found on the premises was seized at that time by the Agents.

Subsequently, on January 12, 1962, the defendant, John Joseph Zax, was arrested and taken into custody. His interest in the premises in question arises out of an alleged oral rental agreement which he had entered upon with the owner during the latter part of December, 1961. The agreement, as the evidence indicates, was the granting of a right to use the building for storage purposes on a month-to-month rental basis at the rate of $100 per month. Rental for the first month was paid in cash.

The defendants move pursuant to Rule 41(e) to suppress the use in evidence at trial against defendants of the men's wearing apparel which was seized by the F.B.I. Agents on January 11, 1962. Testimony has been taken on the question of whether any one or more of the defendants has standing to challenge the seizure and on the further question of whether or not the arrests made without a warrant were unlawful. At the conclusion of testimony relating to standing of any one or more of the defendants to challenge the seizure as the product of an unlawful search,

the Court reserved decision and continued the hearing on whether there was probable cause for the Agents to believe on the evening of January 11, 1962, at the time they arrested the defendants, Harold Konigsberg, Joseph Juliano, Joseph Celso and Joseph Nalewajka, that a felony had been committed or was in process of being committed by these defendants on the premises at 15 West 22nd Street, Bayonne, New Jersey.

It seems clear from the case law on the construction and application of Rule 41(e) that to qualify as a person aggrieved by an unlawful search and seizure, it must be shown that such person has some interest in the premises searched. The extent of such an interest and the burden upon a defendant to establish it is open to question. It has been held that a defendant is not required to bear the burden of proof to establish an interest in the premises searched where to do so would either incriminate him with respect to the offenses charged or induce him to commit perjury. *Jones* v. *U. S.*, 362 U. S. 257 (1960).

Parenthetically, I note here with reference to the proof necessary to establish guilt in this case that it is different from that in the *Jones* case. There, the situation was one where mere possession of the narcotics would establish a prima facie case of guilt. Here, that is not the situation. In this case, possession standing alone is not sufficient to establish guilt. Adhering to the factual situation presented in the *Jones* case, the rule enunciated was that where proof of possession established a prima facie case of guilt a defendant could not be placed upon the horns of the dilemma to which Judge Learned Hand referred in the case of *Connelly* v. *United States*, 58 F. 2d 629 (C. A. 2, 1932). It may well be argued that a liberal application of the rule stated in the *Jones* case would extend it to one where possession

of stolen goods was an element of the offense charged by the Indictment, though not the only element of such offense which the Government would have the burden to establish. Hence, it may be reasoned that a defendant cannot be compelled to furnish any proof with respect to standing which would tend to incriminate him in any degree.

This poses the question of how far a defendant may be required to go to establish standing without invasion of his constitutional rights under the Fifth Amendment.

I do not feel that the *Jones* case eliminates interest in the premises as a material element of proof with respect to one who is claiming standing as a person aggrieved by an unlawful search and seizure because the Court in that case stated:

> "No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone *legitimately* on the premises where a search occurs may challenge its legality by way of a motion to suppress when its fruits are proposed to be used against him." (Emphasis supplied.)

And then we have the significant language of that decision on this point. The Court further stated:

> "This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched."

It seems to follow, that if a defendant is a stranger to the premises, having no legimate interest therein, he would have no right to claim himself a person aggrieved by a search of those premises when it is established, without

requiring him to incriminate himself, that such legitimate interest therein is non-existent. To hold otherwise would be to give no effect to the language of the Supreme Court which I have just quoted. Moreover, when a defendant voluntarily takes the stand to give testimony with respect to his interest in the premises, the Court is not depriving him of any constitutional right by accepting his tesimony. The constitutional right to rest upon any alleged presumption of lawful presence on the premises may be waived.

Moreover, the testimony of others than a defendant with respect to his presence upon the premises searched may also be considered in the determination of whether or not he had such legitimate interest therein as would place him within the classification of a person aggrieved by an unlawful search.

It is the opinion of this Court that, giving full effect to the *Jones* decision, it does not hold, as has been suggested by some of the defendants, that the Court may not consider any proof with respect to a legitimate interest in the premises of one who claims himself aggrieved by an unlawful search. The *Jones* decision seems to go no further than to hold, on the facts in that particular case, that the petitioner there was not required to go further than he did in his testimony which established a lawful presence upon the premises where the search occurred. Whether the may have rested on less is not clear.

In this case, Mr. Levine, the owner of the premises at 15 West 22nd Street, Bayonne, New Jersey, testified to the fact that he had rented this property to the defendant, John Joseph Zax, by oral agreement on a month-to-month basis at a monthly rental of $100 per month. According to Mr. Levine, the premises were rented to Mr. Zax for the

purpose of storing some furniture and other items which Mr. Zax possessed in connection with his restaurant and tavern business operated as the Hoo-Ha Club. This oral rental agreement was entered upon during the latter part of December, 1961. According to the testimony of John Joseph Zax, he found the premises in a dilapidated condition with broken windows and no heat and, in fact, in such general dilapidated condition that he was not prepared to expend the money that would be required to restore these premises to a usable condition.

The premises had been vacant for a considerable part of 1961, according to the testimony of the owner. The last tenant prior to Mr. Zax operated a garage there. Photographs introduced in evidence showing the appearance of the building, taken together with the testimony as to its condition, emphasizes that, at least as far as use was concerned, it was abandoned. It was vacant, and it would take considerable expensive renovation to restore it to a point where it could be put to some useful purpose.

Mr. Zax suggested, in connection with his testimony, that the storage of some furniture and some of his other equipment was merely an incidental use to that which he originally contemplated. He went on to say that he wanted to use the premises as a pla[illegible]here meetings could be held by the Garden State Betterment League, described as a civic charitable organization that had previously held meetings at his tavern and restaurant known as the Hoo-Ha Club. This defendant also testified that, during the early part of January, after he had given some consideration to the condition of the building and the use to which it could be put and the funds that would be necessary to renovate it, he entered into an oral sub-rental agreement with a man named Pope, and that he, Pope, paid the sum of $50 in cash

for the use of the premises for approximately two or three weeks. What Pope intended to do with the premises is not clear from the testimony. He was not seen in the vicinity after this alleged rental agreement.

The dfendant Zax did not visit the building after he rented it to Pope. Pope was never seen to take possession of it according to the testimony, and the owner, Mr. Levine, evidently knew nothing of the arrangement with Mr. Pope and knew of no activity in connection with any proposed use of this building, except as suggested to him by Mr. Zax.

As the sequence of events goes, following the oral rental agreement with Pope made on or about January 3 or 4, it seems that on the evening of January 11, 1962, approximately seven days after the oral rental agreement with Pope, the defendants, Harold Konigsberg, Joseph Juliano, Joseph Celso and Joseph Nalewajka, were found in the premises in which there was stored approximately 1700 suits of clothing piled in heaps on the floor on wrapping paper and plywood boards. There was also found on the premises a station wagon inside the building, and there were suits of clothes piled in the station wagon.

I have made some reference to the condition of the building, and I won't recite at length all of the evidence describing the general condition. Suffice it to say that the windows were boarded up, the heat was not operating, and its utility for occupational use, without expensive renovations, was non-existent.

It was, as far as I can determine from the evidence, still in a state of abandonment as to any usual or recognized legitimate business or other occupational use and, in that sense, continued to be a vacant, unoccupied building.

The defendant, Juliano, testified that, on the evening of January 11, 1962, he was in the Hoo-Ha Club and, while

there, was asked to move his car from where it was parked in front of the garage; that he went out and moved his car; that, after he had done so, someone called him and asked him to come inside the building. He went in.

When he was inside, the defendant Nalewajka told Juliano to pick out a couple of suits. Juliano testified he was in the building for one-half to three-quarters of an hour trying to find his size from the pile of suits that was stacked on the floor. Juliano stated that his arthritis was giving him trouble and that he couldn't find his size and wanted to get out. He was told to wait—that "we will all go out together" It was shortly after that that the lights were extinguished and then the door was raised, and Mr. Juliano had his opportunity to go out.

I find from the credible testimony that Mr. Levine was the owner of the building; that the defendant, John Joseph Zax, acquired a right to possession by oral rental agreement; that this defendant, after examination of the building, had reached the conclusion that he didn't have the money to make use of it for any immediate purpose and temporarily divested himself of such interest he may have had in it by renting it to Mr. Pope for a period of two to three weeks. I find that Mr. Levine, the owner, did not authorize anyone except Mr. Zax to use the building. Mr. Zax, according to his testimony, did not authorize anyone to use the building except Mr. Pope. It has been suggested here by counsel for the defendants Konigsberg, Celso, Juliano, and Nalewajka that they could have been in the building legitimately with the permission of Mr. Pope. But there is no evidence that would support this suggestion.

Considering all of the evidence relating to the alleged rental agreements, the condition of the building, and the

circumstances pursuant to which the defendants, Juliano, Nalewajka, Celso, and Konigsberg, were found therein on the evening of January 11, 1962, it seems to me that a reasonable inference can be drawn from this evidence that no one of them had any permissive right of use and occupation of the premises associated with any legitimate purpose. No one of them had any interest by virtue of title or rental agreement. It was obvious that no business was being conducted on the premises. The only use being made of the interior at the time these defendants were found there was the storage of contraband. Where an alleged right of privacy on the part of one found in the proximity of contraband goods is entirely disassociated with any right or color of right of lawful presence, it seems to me that the right of the privacy alleged is non-existent, and, therefore, invasion of such right cannot be claimed.

Moreover, it seems to me that, where the evidence adduced is susceptible of a finding by the trier of the fact that presence on the premises was not legitimate, the burden shifts to a defendant to come forth with evidence of a lawfully permissive presence to rebut the inference. He may choose not to do so and, in such event, the inference of unlawful presence may prevail.

I further find, with respect to this particular building, considering the state it was in as of January 11, 1962, that it was not, as to the defendants Juliano, Nalewajka, Celso, and Konigsberg, a building within which they could claim a right of privacy with attendant protection to them afforded by the Fourth Amendment. It has been held that a business office is protected, and so may be a store. A hotel room, under the Fourth Amendment, may become a person's house; and so, of course, may an apartment. An automobile may not be unreasonably searched, and neither may an occupied taxicab.

Appendix B

In this instance, we have a garage which is not part of the curtilage of any residence. There is no evidence that any business was being conducted in it. It was vacant and in an abandoned status so far as any use was concerned except storage of the contraband found on January 11, 1962. See comment in the case of *U. S.* v. *Fowler*, 17 FRD 499 (S. D. Cal., 1955), on pp. 502-503, concerning need for a search warrant to search a detached garage.

I find from the evidence relating to this particular garage that, at the time of the seizure of the clothing located therein, it was not a building within the purview of the Fourth Amendment whereby search thereof without a warrant would constitute an invasion of the privacy of any one of these defendants.

Now I could stop here with the holding that no one of these defendants, as I find from the evidence, has standing to challenge the seizure and to suppress the evidence as persons aggrieved by unlawful search and seizure, but we have spent considerable time in the taking of testimony, and I find it to be the obligation and duty of the Court to make a complete finding of fact with respect to probable cause for the arrests without a warrant and the searches incident thereto. Where a search and seizure are incident to a lawful arrest, the motion to suppress the evidence obtained must be denied. *Draper* v. *U. S.*, 358 U. S. 307 (1959).

By the provisions of Title 18 USC §3052, Agents of the Federal Bureau of Investigation are authorized to make arrests without a warrant if they have reasonable grounds to believe that the person to be arrested has committed or is committing a felony. An arrest made in accordance with the provisions of this statute is a lawful arrest.

Appendix B

This leads to the factual question of whether or not the Agents did, on January 11, 1962, at the time of the arrests, have reasonable grounds to believe that the defendants, Konigsberg, Juliano, Celso and Nalewajka, had committed or were committing a felony.

On or about December 21, 1961, there was a massive shipment of men's suits and wearing apparel hijacked from New York State. There was no comparable theft of this character in the immediate geographic area. Investigation was conducted by the Agents of the Federal Bureau of Investigation. During the course of the investigation, attention was directed by an informer to the fact that large quantities of clothing were emanating from the area of the Hoo-Ha Club in Bayonne, New Jersey, and this information led the Agents, in the course of their investigation, to this particular area within which there was suspicion that the goods might be stored. Surveillance of the area began on January 10, 1962; and it was then that activities between the Hoo-Ha Club and the garage were observed. Among other activities, an automobile was observed to enter the apparently vacant garage and then come out of the garage and park. Thereafter, suits of clothing with white tags were observed in the automobile.

Considering up to this point the information furnished by an informer, the activities which the Agents had observed in the neighborhood of the Hoo-Ha Club, the nature and character of the garage, the suspicious circumstance that an automobile entered the garage and came out of the garage and had clothing in it. I find from such facts that there was sufficient reason to justify the further surveillance of this particular garage because of the possibility that some of the hijacked clothing might be stored therein.

Appendix B

Surveillance was continued on the night of January 11, 1962. The Agents, as I recall the testimony, arrived in the area at approximately 7:00 P.M. It was at approximately 9:00 P.M. that Mr. Juliano was observed moving his car from the front of the garage. Then, later, the door opened, and a station wagon entered the dark garage, and the door closed. Surveillance closed in, the Agents taking up positions on the east and west end of the front door to the garage.

While the Agents were stationed at the corner of the garage, they heard the rustling of paper and laughter from inside. No lights could be observed from the outside. Later, while the Agents were stationed outside, the door, operated from the inside, started to rise. After the door had arisen and the Agents came to the front opening, they were able, with the lights from the street and with the aid of their flashlights, to observe clothing piled in heaps on the floor and a station wagon with the front pointed to the door with suits piled in it and a man behind the wheel.

There has been considerable argument here with respect to the particular moment when the arrests occurred, the contention being that a search occurred before the arrests were actually made. I find, as a fact, that when the door arose, the contents of this garage were voluntarily disclosed to the Agents standing on the sidewalks; that the Agents then announced to all in the garage, "You are under arrest"; and that any search and seizure thereafter were incidental to the arrests.

On the issue of whether the Agents had probable cause to believe that a felony had been committed or was being committed by the occupants of the garage at the time of the arrests; consideration must be given to the following

pertinent information which they had prior to making the arrests: A shipment of approximately 3500 items of men's suits and wearing apparel had been stolen in New York State; it was the only theft of such magnitude that had occurred in the immediate geographic area. Information furnished by a confidential informer prior to January 9, 1962, led the Agents to the area of the Hoo-Ha Club in Bayonne. There was corroboration of this information by the activities which occurred in the neighborhood of the Hoo-Ha Club and the garage, specifically the entrance into the garage of an automobile and the observation that, when it came out of the garage and was parked, it had suits with tags on them loaded in it. The further and final corroboration occurred when the door of the garage was voluntarily opened by those in possession, disclosing before the eyes of the Agents who were conducting the surveillance clothing in great quantity piled in heaps on the floor and on wrapping paper and plywood, together with the further fact that the station wagon which had previously entered the garage empty was observed therein loaded with clothing. The boarding up of windows in the garage and the secretive manner in which all of the activities were conducted are further factual elements to be considered. There was also evidence as to the reputation of the Hoo-Ha Club, particularly as to the character of the people who frequented it.

It is my opinion that the knowledge which the Agents had prior to the making of the arrests of the defendants Konigsberg, Juliano, Celso and Nalewajka, as disclosed by the evidence, was certainly sufficient to generate a reasonable belief in the mind of any alert, intelligent police officer that a felony had been committed or was being committed by the occupants of the garage. Accordingly, I find,

as a fact, that the Agents, acting pursuant to the provisions of 18 USC §3052, did have reasonable ground to believe, at the time the arrests were made, that each person in the garage had committed or was committing a felony.

The defendant, John Joseph Zax, was not present in the garage at the time of the seizure of the contraband found there. He was arrested on January 12, 1962, as a result of the evidence seized and the information concerning his interest in the premises. Having found that the arrests of the defendants, Harold Konigsberg, Joseph Juliano, Joseph Celso, and Joseph Nalewajka, were lawful at the time they were made and that the seizure of evidence incident to those arrests was a product of a lawful search, I find that the defendant, John Joseph Zax, has no standing to move to suppress the evidence because of the fact that he was not present in this building in which he claimed a right of possession by his oral lease. *Clifton* v. *U. S. A.*, 224 F. 2d 329 (C. A. 4, 1955).

In concluding, there are some other observations that I wish to make in connection with my findings. It was contended here during the course of argument that the use of flashlights constituted such intrusion into these premises as to constitute a search. There is also argument advanced to the effect that the arrests took place when the officers stationed themselves outside the garage where they were in a position to prevent anyone from leaving the premises if they chose.

As to use of flashlights constituting a preliminary search before the arrests were made, I find that, under the circumstances existing with the garage windows boarded up, with activity going on inside, with a reasonable inference that lights were on inside but the view from outside was barred,

that when the doors opened in the manner in which it did with the lights then out, these police enforcement officers standing on the sidewalk were justified in using their flashlights in the performance of their duties, if for no other reason than to protect their own safety under the circumstances then existing. *Bell v. U. S.*, 254 F. 2d 82 (C. A., D. C., 1958).

I further find that no arrests were made at the time the F.B.I. Agents were stationed outside the garage prior to the time that the door was opened by those inside, but rather that surveillance was being continued, and that no arrests were intended or actually made until the garage door raised and the occupants of the garage involved did, by their own action, disclose what was inside. At that time, the Agents were still on the street, and the arrests did not occur until the Agents announced, "We are the F.B.I. You are under arrest."

There was another point raised touching upon the question of how much information would justify a reasonable person in reaching the conclusion prior to making an arrest that a felony has been committed or is likely to be committed. I find the test is not what an average person is likely to believe, but rather what a reasonably prudent law enforcement officer would have probable cause to believe under the same or similar circumstanc[illegible]. Probable cause is not a philosophical concept existing in a [illegible]um. It is a practical and factual matter that consider[illegible]n must be given to the training of a pe[illegible]apacity that he, in the exercise of reasonable judgment as a police officer, has to evaluate facts and to understand the import of facts and of circumstances. He is a person who has knowledge of what may constitute an offense and capacity to evaluate the facts known to him in terms of reasonable

belief. The test is what facts can be considered sufficient in any given case to generate in the mind of a reasonably prudent police officer a reasonable belief that a felony has been committed or is being committed.

The foregoing shall be deemed to be the findings of fact and conclusions of law of the Court, in lieu of the oral opinion heretofore stated upon the record; and, in accordance therewith, the motion of each of the defendants to suppress the evidence obtained by seizure of the men's suits and wearing apparel found on the premises at 15 West 22nd Street, Bayonne, New Jersey, on January 11, 1962, is denied.

APPENDIX C

Opinion of the United States Court of Appeals for the Third Circuit

(Filed—August 13, 1964)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 14563 to 14567 inclusive

UNITED STATES OF AMERICA,

v.

HAROLD KONIGSBERG, JOSEPH JULIANO, JOHN JOSEPH ZAX, JOSEPH CELSO and JOSEPH NALEWAJKA.

HAROLD KONIGSBERG, *Appellant in 14563.*

JOSEPH NALEWAJKA, *Appellant in 14564.*

JOSEPH JULIANO, *Appellant in 14565.*

JOHN JOSEPH ZAX, *Appellant in 14566.*

JOSEPH CELSO, *Appellant in 14567.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued June 16, 1964

Before McLAUGHLIN, KALODNER and STALEY, Circuit Judges

Appendix C

Opinion of the Court

By McLaughlin, *Circuit Judge.*

Appellants Konigsberg, Nalewajka, Juliano and Celso were indicted, tried and convicted of unlawful possession of goods stolen from interstate commerce in violation of Title 18 U.S.C. §659. Appellant Zax was indicted, tried and convicted of unlawful concealment of goods valued in excess of $5,000 which had been stolen from interstate commerce, in violation of 18 U.S.C. §2315.

Appellants argued that they had standing to move for the suppression of evidence, to object to its introduction and that the evidence should have been suppressed.

The case centers around the hijacking of some 3,000 men's suits in Parksville, New York. Approximately 1,700 of these were brought to Bayonne, New Jersey and placed in an old garage at 15 West 22nd Street that city. There was substantial evidence that on the night of January 11, 1962, the garage was located in a very poor neighborhood. It was unheated, its windows were constantly being broken by neighborhood children, it had been vacant since the early part of 1961, at least on one occasion the police had removed some old drunks who had entered through a side door. The owner of the building, testifying on behalf of the defense, said that he didn't take care of the building, that he wanted to get rid of it.

Zax said that he had leased this garage on a month to month basis at $100 a month in December, 1961. Levine, the landlord, a witness for Zax, said the latter rented the place for two months. Zax said he gave Levine a hundred

dollars cash. Levine says this was paid him "* * * the end of December in 1961." Zax claimed that he desired to store some furniture of the "Garden State Betterment League" in the garage. He had some furniture moved in during the first week of January 1962 and then had it taken out "* * * because it was raining in there. It was all wet and it was getting—the leather was starting to—I told them to take it back again because I wasn't going to do nothing more there for a while." The oil burner would not start because it was full of water. Asked regarding his intentions for the garage, he answered, "Well, I figured we would hold it for a while and try to get a tenant for it." He testified that around January 6, 1962, one Joseph Pope told him he "* * * would like to use it [the garage] for a week or two * * * I said, Well, you will have to get out if I get a steady tenant" and he said, "All right. I will rent it for a week or two." And he said "How much do you want * * *?" And I said "$50". Q. "And did you lease it to him?" A. "Yes." Around the second of January 1962, Zax saw two fellows in the garage who gave him "no good answer" as to what they were doing there. They had a bottle with them anyhow. Zax also explained that entrance could be made into the building "through the back". According to him, [illegible]'s intention had been to have glass put in the broken windows. However, on January 11, 1962, the windows had all been covered from the inside with plywood. Agent Tootell testified that Zax told him that he had personally boarded up the windows of the first floor of the garage building after he rented it from Levine. Zax during the critical period was manager of a saloon called the Hoo-Ha Club which was across the street from the garage.

In January 1962, prior to the 10th of the month, Walter L. Parker, a Federal Bureau of Investigation agent of approximately fourteen years experience, received a telephone

call from a reliable confidential source telling him that "there was apparently an unlimited quantity of Bond clothes available that was being disposed of in the Bayonne, New Jersey area." Some numbers on the tags of the clothing were given and the clothing was said to be in the area of the Hoo-Ha Club. The Bureau checked the clothing identification with the manufacturer who identified it as part of the stolen shipment. There was testimony that the reputation of Zax, the "operator of this bar" and at least some of its patrons "* * * in law enforcement is not too good". Because of all this the Bureau started a surveillance of the Hoo-Ha and garage location on the evening of January 10th. A car was noticed entering the garage about 8:30 that night. It backed out about ten minutes later and parked on 22nd Street. Several suits with white tags on them were seen lying on the back seat of the automobile. Appellant Juliano suddenly appeared on 22nd Street. A little later a man who came from the Hoo-Ha drove the car away.

About 9:30 the next night, Juliano moved an automobile from in front of the garage to allow a station wagon to back in. Several men left the Hoo-Ha and went into the garage and its door was closed. For about the next hour there was no light from the garage visible to the watching agents. The latter did hear "* * * the rustling of papers and a lot of laughter." Then the garage door was raised from the inside Four Bureau agents were about two feet in front of the door as it opened. Their testimony is that the lights were off in the garage but with the light from the street and from their flashlights they saw in the garage piles of suits on the floor and in the station wagon. Appellant Celso was in the driver's seat of the station wagon. The agents told the people in the garage they were under

arrest. Juliano started to walk out. He and Celso, Konigsberg and Nalewajka who were also in the garage, were taken into custody. Under the circumstances, a search warrant, which had been obtained earlier, was not used. Zax was not in the garage at the time. He was arrested the next day.

Prior to trial the defendants moved to suppress the evidence of the stolen suits. The trial court took testimony and heard exhaustive argument on that motion for seven days. The motion as to Konigsberg, Juliano, Celso and Nalewajka was denied at the conclusion of the argument on the grounds that the garage at the time of the seizure of the suits was not a building within the purview of the Fourth Amendment whereby search thereof without a warrant would constitute an invasion of the privacy of any of the defendants; that none of the defendants had standing to challenge the seizure as persons aggrieved by unlawful search and seizure and that "* * * as a fact the Agents, acting pursuant to the provisions of 18 U.S.C. §3052 did have reasonable ground to believe at the time the arrests were made that each person in the garage had committed or was committing a felony."

Against the overwhelming proof to the contrary, appellants make no attempt to argue that the garage involved was appellants' house within the purview of the Fourth Amendment in which they were entitled to Constitutional protection of their privacy. None of the defendants, including Zax, had a then present possessory interest in the garage. The only one, according to Zax as a trial witness, who had the right at that time to use the building was the mysterious Mr. Pope to whom Zax said he had rented the premises for a week or two on January 4th, 5th, 6th or 7th. Zax asserted that he had received the agreed fifty

dollars rent from Pope and had given him a key. As the trial judge mentioned in his opinion, there had been some suggestion by counsel for the other four defendants that the latter were in the building with the permission of Pope but there is no record support for this. Certainly, Pope was not produced at the trial. Zax stated regarding him, "I know he has not been around in quite a while." Beyond question if appellants were legitimately in the garage as invitees or guests of Pope as sublessee they might well have been under the Fourth Amendment umbrella. However, that is not the situation and, as above noted, there is no pretension that it is.

What appellants are really saying definitely and directly is that since they were caught cold in the garage with the stolen clothes, they were in possession of the clothes and therefor they do not have to prove either a right to be on the premises or to the clothes. Appellants point to their indictment for possession of merchandise stolen in interstate commerce as bringing them within the rule of Jones v. United States, 362 U. S. 257 (1960). The Jones decision concerned a prosecution for violation of federal narcotic laws. The defendant had been convicted under 26 U.S.C. §4704(a), with having "purchased, sold, dispensed and distributed" narcotics not in or from the "original stamped package" and under 21 U.S.C. §174 for having "facilitated the concealment and sale of" the same narcotics, knowing them to have been imported illegally into the United States. Both those statutory provisions permit conviction upon proof of the defendant's possession of the narcotics and, with respect to 26 U.S.C. §4704(a), of the absence of the appropriate stamps. As the Court said, p. 258, "Possession was the basis of the Government's case against petitioner." The entire point of the Jones

opinion as far as we are concerned on this appeal is that the Supreme Court there extended the doctrine that a genuine possessory interest in the premises involved made out a sufficient interest in the premises to establish such person as one aggrieved by the search. The Court (page 267) extended the doctrine to include "* * * anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." That necessary condition did not exist here. Nor does the ambivalent argument that possession of the solen clothes in the defendants "eliminates any necessity for a preliminary showing of interest in the premises searched or the property seized, which ordinarily is required when standing is challenged." Jones p. 263. That holding was specifically directed to the sui generis problem before the Court as to which the latter held p. 263, "The same element in this prosecution [narcotics] which has caused a dilemma, i.e. possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, *which ordinarily is required when standing is challenged.*" (Emphasis supplied).

In Jones, by statute, proof of possession was enough to convict. The controlling law of this appeal has no such provision or intimation. Possession is only one element of the crime charged. The theft, interstate commerce, knowledge of the theft and value of the stolen clothes all were matters of proof by the Government without which the charge would fall as a matter of law. The Jones rule governs as of course in a proper case. It is not applicable to the issue before us. Cf. United States v. Romano, 203 F. Supp. 27, 30-31 (D. C. D. Conn. 1962). Ramariez v. United States, 294 F. 2d 277. (9 Cir. 1961).

Appendix C

Appellants also argue that the arrests of the four defendants in the garage were without probable cause. The reason advanced for this proposition is that "At the time the arrest was announced the Agents were without reasonable grounds to believe that the persons arrested had committed or were in the process of committing a felony." Appellants in this statement are, as they must, giving the converse of the statutory power to arrest without warrant. 18 U.S.C. §3052. Actually the Agents had with them a search warrant for the garage building issued earlier in the day, January 11, 1962. At the garage, prior to the opening of its door from the inside, the Agents knew that some suits resembling the stolen shipment and bearing identification tags like those marking the missing suits had been brought from the garage the night previous. They had a whole series of incidents, some of which are briefly alluded to in the statement above, focusing on the Hoo-Ha Club, its management and habitues with particular reference to the garage, its condition, use and contents. The Agents were directly in front of and close to the garage door, prior to any opportunity of serving the warrant. At that time the door was opened from within and rose up leaving the interior of the garage in the plain view of the Agents. They, without search, saw a mass of men's suits with identification tags, piled up in a station wagon in the garage and on the floor thereof. Upon the entire factual circumstances, the Agents then had justifiable grounds for believing that a felony had been and was being committed. Arresting the four defendants in the garage was proper under the statute and called for on the part of the Agents.

Appellants allege substantial error because their motion for the name of the informant referred to in the above

factual statement was denied. In this instance reliance is placed upon Roviaro v. United States, 353 U. S. 53 (1957). That opinion sets out the basic standards under which the trial judge may require disclosure of an informant's identity. It occurs, as Mr. Justice Burton said for the Court, pp. 60-61, "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, ... From our own study of this record, the disclosure of the informer's name was palpably not essential to the fair determination of this cause. Nor was its relevancy and helpfulness to the defense shown. The preservation of the informer's anonymity is to encourage and protect him in performing his obligation to communicate knowledge of commission of crimes to law enforcement officials. As the Court said in Roviaro, p. 62:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

The trial judge in this matter under its particular facts was well within his sound discretion in refusing to permit the informer's identity to be revealed.

The conviction of Zax for the statutory offense of concealment of the stolen property is protested as inconsistent

with the other verdicts returned and therefore the result of passion, etc. It is urged that acquitting Zax of possessing and storing the property makes it impossible for a reasonable jury to find him guilty of being a part of the deliberate, criminal concealment of the suits after their theft. It would seem to have weighed heavily with the jury, as far as the possession charge was involved, that Zax admittedly was not in the garage with the suits as were the other four when arrested. Pointing to the obvious sharp distinction between storage and concealment, the jury did not find anyone guilty of storage. The evidence was all to the effect that the suits were concealed in the dilapidated garage for the purpose of processing them for surreptitious sale, not for storage.

Zax was the lessee of the garage. He did testify that he subleased it to Pope for one or two weeks. The jury may not have believed this. There was valid evidence that Zax had to do with the boarding up of the garage windows during the critical period. He had the garage locks changed at that time. There was evidence that Zax stated that as late as January 9, 1962, he had allowed a truck driver, not identified, to unload his truck in the garage. An Agent testified that Zax, together with Nalewajka and Juliano, on January 9 and 10, 1962 while in the Hoo-Ha Club took turns looking across the street in the direction of the garage. The same Agent on January 9, 1962 saw Zax go from the Hoo-Ha and return shortly thereafter "* * * with some pieces of cardboard, a hammer and what appeared to be some thumb tacks." Then he and Nalewajka left and the Agent saw that "they were walking directly to this big building where there is an old garage there." Under all of the evidence the jury reasonably could, as it did, find Zax guilty of primary relationship to the concealment of the suits.

Appendix C

On behalf of appellant Konigsberg, by way of supplemental brief, it is argued that the latter was denied the assistance of counsel under Escobedo v. State of Illinois, U. S. Sp. Ct., op. filed June 22, 1964. In that case petitioner was, according to the Supreme Court slip opinion, p. 4, "* * * a 22-year old of Mexican extraction with no record of previous experience with the police, * * *." The Supreme Court stated the facts as follows:

> "On the night of January 19, 1960, petitioner's brother-in-law was fatally shot. At 2:30 a.m. that morning, petitioner was arrested without a warrant and interrogated. Petitioner made no statement to the police and was released at 5 p.m. that afternoon pursuant to a state court writ of habeas corpus obtained by Mr. Warren Wolfson, a lawyer who had been retained by petitioner.
>
> "On January 30, Benedict DiGerlando, who was then in police custody and who was later indicted for the murder along with petitioner, told the police that petitioner had fired the fatal shots. Between 8 and 9 p.m. that evening petitioner and his sister, the widow of the deceased, were arrested and taken to police headquarters. En route to the police station, the police 'had handcuffed the defendant behind his back,' and 'one of the arresting officers, told defendant that DiGerlando had named him as the one who shot' the deceased. Petitioner testified, without contradiction that the 'detectives said they had us pretty well, up pretty tight, and we might as well admit to this crime,' and that he replied, 'I am sorry but I would like to have advice from my lawyer.' A police officer testified that although petitioner was not formally charged 'he was in custody' and 'couldn't walk out the door.'

Appendix C

"Shortly after petitioner reached police headquarters, his retained lawyer arrived. The lawyer described the ensuing events in the following terms:

'On that day I received a phone call [from "the mother of another defendant"] and pursuant to that phone call I went to the Detective Bureau at 11th and State. The first person I talked to was the Sergeant on duty at the Bureau Desk, Sergeant Pidgeon. I asked Sergeant Pidgeon for permission to speak to my client, Danny Escobedo * * *.'"

The attorney was not allowed to see his client. Continuing with the facts, the Court said p. 4:

"It is undisputed that during the course of the interrogation Officer Montejano, who 'grew up' in petitioner's neighborhood, who knew his family, and who uses 'Spanish language in [his] police work,' conferred alone with petitioner 'for about a quarter of an hour * * *.' Petitioner testified that the officer said to him 'in Spanish that my sister and I could go home if I pinned it on Benedict DiGerlando,' that 'he would see to it that we would go home and be held only as witnesses, if anything, if we had made a statement against DiGerlando * * *, that we would be able to go home that night.' Petitioner testified that he made the statement in issue because of this assurance. Officer Montejano denied offering any such assurance.

"A police officer testified that during the interrogation the following occurred:

'I informed him of what DiGerlando told me and when I did, he told me that DiGerlando was [lying] and I said, "Would you care to tell DiGerlando

> that?" And he said, "yes, I will." So, I brought * * * Escobedo in and he confronted DiGerlando and he told him that he was lying and said, "I didn't shoot Manuel, you did it."

"In this way, petitioner, for the first time, admitted to some knowledge of the crime. After that he made additional statements further implicating himself in the murder plot."

The Assistant State's Attorney "* * * testified that he did not advise petitioner of his constitutional rights and it is undisputed that no one during the course of the interrogation so advised him."

The Supreme Court of Illinois originally held the statement inadmissible and reversed the conviction, saying:

> "It seems manifest to us, from the undisputed evidence and the circumstances surrounding defendant at that time of his statement and shortly prior thereto, that the defendant understood he would be permitted to go home if he gave the statement and would be granted an immunity from prosecution."

On rehearing, the conviction was affirmed, the court finding the confession was voluntary. As to that phase of the matter, the Supreme Court, pp. 7, 8, commented:

> "The interrogation here was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference. When petitioner requested, and was denied, an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of 'an unsolved crime.' Spano v. New York, 360 U. S. 315, 327 (Stewart, J.,

concurring). Petitioner had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so. At the time of his arrest and throughout the course of the interrogation, the police told petitioner that they had convincing evidence that he had fired the fatal shots. Without informing him of his absolute right to remain silent in the face of this accusation, the police urged him to make a statement.[5] As this Court observed many years ago:

> 'It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with a crime, the result was to produce upon his mind that fear that if he remained silent it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person, and it cannot be conceived that the converse impression would not also have naturally arisen, that by denying there was hope of removing the suspicion from himself.' Bram v. United States, 168 U. S. 532, 562.

"Petitioner, a layman, was undoubtedly unaware that under Illinois law an admission of 'mere' complicity in the murder plot was legally as damaging as an admission of firing of the fatal shots. Escobedo v. Illinois, 28 Ill. 2d 41. The 'guiding hand of counsel' was essen-

[5] "Although there is testimony in the record that petitioner and his lawyer had previously discussed what petitioner should do in the event of interrogation, there is no evidence that they discussed what petitioner should, or could, do in the face of a false accusation that he had fired the fatal bullets."

tial to advise petitioner of his rights in this delicate situation. Powell v. Alabama, 287 U. S. 45, 69. This was the 'stage when legal aid and advice' were most critical to petitioner. Massiah v. United States, supra, at [illegible]. It was a stage surely as critical as was the arraignment in Hamilton v. Alabama, 368 U. S. 52, and the preliminary hearing in White v. Maryland, 373 U. S. 59. What happened at this interrogation could certainly 'affect the whole trial,' Hamilton v. Alabama, supra, at 54, since rights 'may be as irretrivably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.' Ibid. It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder."

And on p. 10, the Court, speaking directly to the undisputed drive for a confession in Escobedo said, "There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice."

From the above statement of the exact situation in Escobedo, the Court concluded, pp. 12-13:

"We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the policy carry out a process of interrogations that lends itself to eliciting incriminating statements, the

suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U. S., at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

The Court strongly emphasized its above finding in the final paragraph of its opinion, saying:

"Nothing we have said today affects the powers of the police to investigate 'an unsolved crime,' Spano v. New York, 360 U. S. 315, 327 (Stewart, J., concurring), by gathering information from witnesses and by other 'proper investigative efforts' Haynes v. Washington, 373 U. S. 503, 519. We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."

The ruling of the Supreme Court is very clear and as of course is to be, and will be, followed explicitly where applicable. The facts of the appeal before us are well without the range of the Escobedo decision. The subject matter here involved was some stolen clothing. Konigsberg was one of five people found with the merchandise. At the time of trial he was thirty-five years old. He had been convicted of robbery in 1949. From his own testimony he was

well acquainted with police arrest procedures. All of the people in the garage were told "This is the F.B.I. You are under arrest." The prisoners were instructed to put their hands against the garage wall. Konigsberg refused so the officers put handcuffs on him. Shortly after that all the prisoners were taken to the F.B.I. office in Newark, a few miles west of Bayonne, in several ordinary passenger cars driven by agents. Konigsberg rode with Agents Straub and Roetzel. Straub advised him that he was entitled to an attorney and that anything he said might be used against him in a court of law. At the F.B.I. office the prisoners were fingerprinted and photographed. Konigsberg had approximately $11,000 currency on his person which he meticulously counted with the agent. Straub testified that "* * * we asked him the circumstances as to why he was in this garage and just what had taken place. * * * We desired to talk and see if he wished to cleanse himself or explain. * * * As to why he was there, what his reasons for being there were, why the other individuals were there." Konigsberg's attorney, who was cross-examining Straub at the time, then said to Straub "Q. If he could explain." Straub answered, "If he could explain. We wanted to hear his side of the story that would come from him, if it would. We had to fingerprint Mr. Konigsberg. We had to photograph him." Agent Roetzel, also there, said that in the course of the talk Konigsberg

> "* * * made a statement that this was the only legitimate arrest that the F.B.I. had ever made of him. He made a statement that this was one thing that we had, meaning the F.B.I.— * * * He made the statement that there was one thing that we had that he didn't have, and that was stool pigeons, and he made the statement when he was asked what he was doing in the

garage, he said, 'In what garage?' Then followed by a statement that, 'I was trying to help a fellow out.' "

Konigsberg, on the witness stand, denied that he was told by the F.B.I. that he was entitled to a lawyer. Straub stated that Konigsberg on the way to Newark said he wanted to make a telephone call but did not say to whom or the purpose of the call. After the photographing and fingerprinting of the appellants was completed, they were taken across the street to Newark Police Headquarters where Konigsberg was permitted to telephone. He, at that time, telephoned an attorney.

Straub testified that the talk with Konigsberg "* * * was more like a conversation than an interview." He was asked "* * * did you in any way threaten Mr. Konigsberg or extract from him any answers?" He answered "No. I did not threaten Mr. Konigsberg." Asked, "How were these statements that were given by him made?" He answered "This was just a discussion back and forth, at which time he volunteered these statements."

From all of the above, the trial court found:

> "As I stated before, I find from the testimony I have heard that the statements made by the defendant Harold Konigsberg when he was in custody were not involuntary statements but on the contrary that they were made voluntarily by him and he had been advised of his rights to counsel and of the fact that anything he might state could be used against him. He was, as I find from the testimony, warned before he made any statements that he was not required to make statements, that any statements he did make could be used against him.

Appendix C

"He was likewise advised of his right to counsel.

"There is no evidence of any intimidation, no evidence, circumstantial or otherwise, that he was under duress or that any hope of reward or promise of leniency were held out to him to induce statements.

"He might well have chosen to refuse to say anything. He chose to make comments, and the text of them would indicate the voluntary nature."

In this appeal at the time the F.B.I. agents talked with Konigsberg the process was definitely investigative and never shifted to accusatory. Its purpose was not to elicit a confession; there were no threats or attempt to extract admissions from Konigsberg, damaging or otherwise. The uncontradicted purpose of the discussion was to give Konigsberg a chance to explain his presence in the garage if he could; to hear Konigsberg's side of the story. None of that is denied by Konigsberg. Focus was not centered on Konigsberg, there was a general inquiry in progress concerning the unsolved hijacking of the Bond clothing. If Konigsberg or any of the other people caught in the garage could account for their presence this was their opportunity. Nor was there any thought of the alleged tactic in Escobedo of promising if one or more of the prisoners were accused by him Konigsberg would go free. There is nothing in this appeal of Konigsberg which could reasonably bring it within the scope of the Escobedo doctrine.

Since Escobedo is inapplicable to the situation before us; the argument that Konigsberg's statement was involuntary and therefore he was deprived of due process of law under Jackson v. Denno, U. S. Sp. Ct. opinion filed June 22, 1964, must fall.

Appendix C

There were other points on behalf of appellants. We have examined these. They are without merit and need no discussion.

These appellants were given a fair, patient trial. They were competently and tenaciously defended. We find no error.

The judgments of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX D

Judgment of the United States Court of Appeals Sought to be Reviewed

(Entered on August 13, 1964)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,563

UNITED STATES OF AMERICA,

v.

HAROLD KONIGSBERG, JOSEPH JULIANO, JOHN JOSEPH ZAX, JOSEPH CELSO and JOSEPH NALEWAJKA.

HAROLD KONIGSBERG, Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ——— DISTRICT OF NEW JERSEY

Present: McLAUGHLIN, KALODNER and STALEY, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ——— District of New Jersey and was argued by counsel.

Appendix D

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment filed July 16, 1963, entered July 17, 1963, of the said District Court in this case be, and the same is hereby affirmed.

ATTEST:

HARRIET G. HUMPHRYS
Chief Deputy Clerk

August 13, 1964

APPENDIX E

Opinion of the United States Court of Appeals for the Third Circuit on Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14563

UNITED STATES OF AMERICA,

v.

HAROLD KONIGSBERG, *et al.*,
HAROLD KONIGSBERG,
Appellant.

ON PETITION FOR REHEARING

Before BIGGS, *Chief Judge*, and MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY, SMITH and FREEDMAN, Circuit *Judges*.

OPINION OF THE COURT

(Filed September 18, 1964)

PER CURIAM.

In this petition for rehearing, on behalf of appellant and in reliance upon Escobedo v. Illinois, U. S.

(op. filed June 22, 1964), the claim is made that Konigsberg's statements to the F.B.I. agents were in effect involuntary. The Escobedo rule quoted in our opinion is that "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused *and its purpose is to elicit a confession*—our adversary system begins to operate, *and under the circumstances here*, the accused must be permitted to consult with his lawyer." Emphasis supplied. U. S. , p. 14 slip opinion. As is seen, in order to apply Escobedo, the process must be accusatory, to elicit a confession and with the circumstances comparable to those in Escobedo. Under the evidence documented in our opinion, we found that the process in this case was investigatory, that it was uncontradicted that there had been no attempt to elicit a confession and that the facts of this matter differed radically from the Escobedo situation. We therefore supported the trial court's conclusion that Konigsberg's statements were voluntary and admissible into evidence.

The petition simply concludes that because Konigsberg was arrested with the others found in the garage and that "* * * they [the F.B.I. agents] knew him and his 'reputation' there was no need for Konigsberg to deny the F.B.I. agents' token and perfunctory statements that the process was investigatory. It was then nothing but accusatory and Konigsberg falls within the protective rule and rationale of Escobedo, supra."

There is nothing in the petition which validly disputes the substantial evidence of the investigative nature of the process as outlined from the record in our opinion. The attack of the appellant, such as it is, goes no further than calling the process accusatory. It makes no pretense that the other two vitally necessary parts of the Escobedo rule

were violated i.e. that there was any attempt whatsoever to elicit a confession or that the facts in this appeal were at all comparable to Escobedo.

It is difficult to understand appellant's point with reference to the disclosure of the identity of the confidential informant. The main brief did rely upon the principle enunciated in Roviaro v. United States, 353 U. S. 53 (1957). And this reliance was repeated in the reply brief. In the latter there is a quotation from the dissent in Rugendorf v. United States, 376 U. S. 528 (1964). But even that dissent quotes with approval the very language from Roviaro that is set out in our opinion.

The remaining contentions in the petition need no comment.

The petition for rehearing will be denied.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX F

Order of the United States Court of Appeals for the Third Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14563

UNITED STATES OF AMERICA,

v.

HAROLD KONIGSBERG,
Appellant.

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge*, and MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY, SMITH and FREEDMAN, Circuit *Judges*.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having

asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

McLAUGHLIN
Judge

Dated: September 18, 1964